Lee Chee Kiang v Johnson Tan Teck Seng & Anor

HIGH COURT (KOTA KINABALU) — NO K22–129 OF 2007–I
DAVID WONG J
14 MARCH 2011

Evidence — Documentary evidence — Extrinsic evidence — Admissibility — Whether extrinsic evidence admissible to explain reasons for creating power of attorney and trust deed — Whether power of attorney and trust deed executed — Incomplete documents — Whether court entitled to know real purpose of documents — Whether extrinsic evidence admitted — Evidence Act 1950 ss 91 & 92

Land Law — Power of attorney — Validity — Whether conveyancing solicitors in Sabah have duty to check on authenticity of powers of attorney

Legal Profession — Conflict of interest — Professional conduct — Common solicitor — Acting as common solicitor for parties in conveyancing transaction — Nature of duty of care owed

Legal Profession — Duty of care — Duty to client — Conveyancing transaction — Whether duty of care owed to client — Test for standard of skill and care expected of legal practitioners — Whether duty differs according to client's education background — Whether solicitors in Sabah owed duty to check on authenticity of powers of attorney — Advising release of purchase consideration before memorial number obtained from land office for lodgment of memorandum of transfer

Tort — Negligence — Duty of care — Solicitors — Duty to client — Conveyancing transaction — Whether duty of care owed to client — Test for standard of skill and care expected of legal practitioners — Whether duty differs according to client's education background — Whether solicitors in Sabah owed duty to check on authenticity of powers of attorney — Advising release of purchase consideration before memorial number obtained from land office for lodgment of memorandum of transfer

The plaintiff claimed for loss suffered in the sum of RM631,300 on the ground that the first defendant had breached his duty of care in contract and in tort, in respect of the purchase of a piece of land ('native land'). The plaintiff was asked by the third defendant as to whether he was interested in purchasing the native

land. The plaintiff agreed to do so but did not have the financial ability to implement his intention. Thus he approached one Tee Hong Wee ('PW1') who was a director, shareholder of Chang Cheng Realty Sdn Bhd ('CC Realty'). The purchase money for the purchase of the native land came from CC Realty or PW1. The owners of the native land were natives and had given a power of attorney to one Tuan Haji bin Lambu ('Lambu power of attorney') with the power to dispose and charge the same to anyone he deems fit. Prior to the purchase of the native land by the plaintiff, the native land was used as a security by the third defendant for a loan from the fourth defendant. To secure that security, a caveat was lodged against the native land. The first and second defendants were retained to prepare the sale and purchase agreement and other relevant documents for the purchase of the native land. The first defendant was also the solicitor involved in the loan transaction from the fourth defendant to the third defendant. The plaintiff was not able to gain ownership of the native land despite having paid the consideration of RM665,300 to Lambu and the fourth defendant, as the Central Land Officer Kota Kinabalu refused to accept the relevant memorandum of transfer on the ground that there was irregularity in the Lambu power of attorney. Hence, this suit. The issues arising for determination were: (i) Whether the plaintiff had the standing to pursue this action? The defendants contended that the plaintiff was not the actual purchaser of the native land but was a mere nominee of CC Realty which was unqualified to purchase the native land as it was not a 'native' company. The plaintiff had executed a power of attorney and trust deed to CC Realty. The plaintiff contended that the power of attorney and trust deed executed by him was 'to comfort Mr Tee' as he had lent the money to purchase the native land. The evidence in respect of this contention was objected to by the first defendant's counsel on the ground that it contravened s 91 of the Evidence Act 1950 which provides no oral evidence is admissible to contradict any terms of agreement when the same has been reduced into writing; (ii) Whether the defendants owed a duty of care to the plaintiff in contract or tort; (iii) Whether the defendants had breached that duty of care?; and (iv) Whether the plaintiff had proved his damages.

Held, allowing the plaintiff's application:

(1) Both the power of attorney and the trust deed were never executed by anyone. They were not completed documents and since the defendants were relying on these documents to advance their case, the court was entitled to know what the real intentions of those documents were. Even if the court sustained the defendants' objection to the evidence, the court was of the view that the power of attorney and trust deed were invalid as they had not been executed by all the relevant parties. Furthermore, even if the plaintiff was a nominee, he sued and could sue on behalf of CC Realty (see paras 11–12).

(2) As there was no dispute by the first defendant that the plaintiff had retained him for the purchase of the native land, the first defendant owed the plaintiff a duty of care (see para 15).

(3) As for the test on the standard of skill and care expected of legal practitioners, in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2002] 2 MLJ 129, the Federal Court departed from the *Bolam* principle and adopted the principle stated in *Rogers v Whitaker* (1992) 175 CLR 479 where it was held that opinions of medical witnesses are not decisive but merely guidelines for the court who will be the final arbiter on what that standard of care should be. Thus, the *Bolam* principle is no longer applicable and the applicable principle is as stated in the Federal Court (see paras 23 & 25–26).

(4) The situation in Sabah as far as power of attorney is concerned is that there is no proper system of registration as in West Malaysia. Hence, the first defendant did not have a duty to check on the authenticity of the power of attorney for the simple reason that there is no way of checking short of calling the donors and the commissioner of oaths to enquire whether the power of attorney is genuine. It would be too onerous a duty to require a solicitor to investigate a power of attorney which on the face of it is proper (see para 34).

(5) There is no legal impediment for a practitioner in Sabah to act as a common solicitor to parties in a transaction. Be that as it may, the first defendant's duty of care to the plaintiff was no less burdensome to that of the other parties in the transaction. The interests of all the parties must be protected even though they may conflict with each other (see para 35).

(6) The contention that the plaintiff and PW1 are not ordinary lay person and hence implying that the first defendant's duty of care is lighter, was untenable. A solicitor's standard of care remains the same whatever their client's education background is (see para 39).

(7) The evidence showed quite conclusively that the first defendant had failed in his basic duty in protecting the interests of the plaintiff. The prevailing conveyance practice in Sabah is to advice against releasing any purchase consideration to the vendor and chargee until a memorial number is obtained from the Central Land Office Kota Kinabalu by the solicitor for the lodgment of the memorandum of transfer. The first defendant had not given any credible reasons as to why he should be exempted from that basic duty (see para 46).

(8) The sum of RM631,300 claimed by the plaintiff had been proved by the plaintiff in the form of documentary evidence and they had not been rebutted by the defendants (see para 47).

(9) This case was a classic example as to why the first defendant should not have acted for the plaintiff or at the very least should have advised him to engage any other solicitor to act for him. He had to serve four masters, the plaintiff, the third defendant, the fourth defendant and the owners of the native land who all had different interests in the scheme of things. It was unimaginable as to how the first defendant or for that matter any solicitor could have resolved all the conflicting interests of the relevant parties. The first defendant had fiduciary duties to all his clients and that duty and standard of care was the same for all his clients (see para 50).

[Bahasa Malaysia summary

Plaintif-plaintif menuntut kerugian yang dialami berjumlah RM631,300 atas alasan bahawa defendan pertama telah melanggar kewajipan berhati-hatinya dalam kontrak dan tort, berkaitan pembelian sebidang tanah ('tanah pribumi'). Plaintif ditanya oleh defendan ketiga sama ada dia berminat membeli tanah pribumi. Plaintif bersetuju berbuat demikian tetapi tiada kemampuan kewangan untuk melaksanakan niatnya. Oleh itu dia berjumpa ('PW1') yang merupakan pengarah, pemegang saham Chang Cheng Realty Sdn Bhd ('CC Realty'). Wang belian untuk membeli tanah pribumi itu datangnya daripada CC Realty atau PW1. Pemilik-pemilik tanah pribumi itu merupakan pribumi dan telah diberikan surat kuasa wakil kepada Tuan Haji bin Lambu ('surat kuasa wakil Lambu') dengan kuasa untuk digunakan dan dipertuduhkan ke atas sesiapa difikirkannya sesuai. Sebelum pembelian tanah pribumi oleh plaintif, tanah pribumi itu telah digunakan sebagai cagaran oleh defendan ketiga untuk pinjaman daripada defendan keempat. Untuk menjamin cagaran itu, kaveat telah dimasukkan terhadap tanah pribumi itu. Defendan pertama dan kedua dikekalkan untuk menyediakan perjanjian jualbeli dan dokumen lain yang berkaitan dengan pembelian tanah pribumi itu. Defendan pertama juga merupakan peguamcara yang terlibat dalam transaksi pinjaman daripada defendan keempat kepada defendan ketiga. Plaintif tidak dapat memperoleh milikan ke atas tanah pribumi itu meskipun telah membayar balasan RM665,300 kepada Lambu dan defendan keempat, kerana Pegawai Tanah Pusat Kota Kinabalu enggan menerima memorandum pemindahan berkaitan atas alasan terdapat luar aturan dalam surat kuasa wakil Lambu. Justeru, guaman ini. Isu-isu yang timbul untuk ditentukan adalah: (i) sama ada plaintif mempunyai kedudukan untuk meneruskan tindakan ini? Defendan-defendan menegaskan bahawa plaintif bukan pembeli sebenar tanah pribumi itu dan hanya penama CC Realty yang tidak layak membeli tanah pribumi itu kerana bukan syarikat 'pribumi'. Plaintif telah menyempurnakan surat kuasa wakil dan surat ikatan amanah kepada CC Realty. Plaintif menegaskan bahawa surat kuasa wakil dan suratikatan amanah yang disempurnakan olehnya adalah

'untuk memujuk Encik Tee' kerana dia telah meminjamkan wang untuk membeli tanah pribumi itu. Keterangan berkaitan hujah ini dibantah oleh peguam defendan pertama atas alasan ia bertentangan dengan s 91 Akta Keterangan 1950 yang memperuntukkan tiada keterangan lisan boleh diterima untuk menyanggah apa-apa syarat perjanjian jika yang sama adalah dalam bentuk bertulis; (ii) sama ada defendan-defendan mempunyai kewajipan berhati-hati kepada plaintif dalam kontrak atau tort; (iii) sama ada defendan-defendan telah melanggar kewajipan berjaga-jaga tersebut; dan (iv) sama ada plaintif telah membuktikan kerugiannya.

Diputuskan, membenarkan permohonan plaintif:

(1) Kedua-dua surat kuasa wakil dan surat ikatan amanah tidak pernah disempurnakan oleh sesiapa. Ia bukan dokumen-dokumen yang lengkap dan oleh kerana defendan-defendan bergantung kepada dokumen-dokumen tersebut untuk mengemukakan kes mereka, mahkamah berhak mengetahui apakah niat sebenar dokumen-dokumen tersebut. Walaupun mahkamah mengekalkan bantahan defendan-defendan terhadap keterangan, mahkamah berpendapat bahawa surat kuasa wakil dan surat ikatan amanah itu tidak sah kerana tidak disempurnakan oleh semua pihak-pihak berkaitan. Bahkan, meskipun plaintif merupakan penama, dia menyaman dan boleh menyaman bagi pihak CC Realty (lihat perenggan 11–12).

(2) Oleh kerana tiada pertikaian oleh defendan pertama bahawa plaintif telah mengekalkannya untuk pembelian tanah pribumi itu, defendan pertama mempunyai kewajipan berhati-hati terhadap plaintif (lihat perenggan 15).

(3) Berhubung ujian piawai kepakaran dan berhati-hati yang diharapkan daripada pengamal undang-undang, dalam kes *Foo Fio Na v Dr Soo Fook Mun & Anor* [2002] 2 MLJ 129, Mahkamah Persekutuan tidak bersetuju dengan prinsip kes *Bolam* dan menggunapakai prinsip yang dinyatakan dalam kes *Rogers v Whitaker* (1992) 175 CLR 479 di mana telah diputuskan bahawa pendapat-pendapat saksi-saksi perubatan bukan muktamad tetapi hanya garis panduan untuk mahkamah yang akan menjadi pengadil terakhir tentang apakah sepatutnya piawai kewajipan berhati-hati itu. Oleh demikian, prinsip kes *Bolam* tidak lagi terpakai dan prinsip yang terpakai adalah sepertimana yang dinyatakan dalam Mahkamah Persekutuan (lihat perenggan 23 & 25–26).

(4) Setakat mana surat wakil kuasa adalah berkaitan dalam keadaan di Sabah, tiada sistem pendaftaran yang teratur seperti di Malaysia Barat. Justeru itu, defendan pertama tidak mempunyai kewajipan untuk menyemak kesahan surat kuasa wakil kerana alasan yang mudah bahawa tiada cara untuk menyemak dengan memanggil pemberi dan pesuruhjaya sumpah untuk menyiasat sama ada surat kuasa wakil itu adalah tulen. Ia terlalu

membebankan untuk menghendaki peguamcara menyiasat jika surat kuasa wakil itu teratur (lihat perenggan 34).

(5) Tiada halangan perundangan untuk pengamal di Sabah bertindak sebagai peguamcara bersama untuk pihak-pihak dalam satu transaksi. Jika begitu keadaannya, kewajipan berhati-hati defendan pertama kepada plaintif tidak kurang bebannya berbanding dengan pihak-pihak lain dalam transaksi. Kepentingan semua pihak patut dilindungi meskipun mungkin bercanggah antara satu sama lain (lihat perenggan 35).

(6) Hujah yang plaintif dan PW1 bukan orang biasa dan justeru itu secara tersirat menyatakan bahawa kewajipan berhati-hati defendan pertama lebih ringan tidak dapat dipertahankan. Piawai berhati-hati peguamcara masih sama tanpa mengira latar belakang anak guam mereka (lihat perenggan 39).

(7) Bukti menunjukkan secara konklusif bahawa defendan pertama telah gagal dalam kewajipan asasnya melindungi kepentingan plaintif. Amalan pemindahhakkan semasa di Sabah adalah untuk menasihat agar tidak melepaskan apa-apa balasan pembelian kepada penjual dan pemegang gadaian sehingga satu nombor memorial diperoleh daripada Pejabat Tanah Pusat Kota Kinabalu oleh peguamcara bagi kemasukan memorandum pemindahhakkan. Defendan pertama tidak memberikan apa-apa alasan kukuh berhubung sebab dia patut dikecualikan daripada kewajipan asas tersebut (lihat perenggan 46).

(8) Jumlah RM631,200 yang dituntut oleh plaintif telah dibuktikan oleh plaintif dalam bentuk keterangan dokumentar dan tidak dipatahkan oleh defendan (lihat perenggan 47).

(9) Kes ini adalah contoh klasik kenapa defendan pertama tidak patut bertindak bagi pihak plaintif atau sekurang-kurangnya patut menasihatnya agar melantik mana-mana peguamcara lain untuk bertindak bagi pihaknya. Dia perlu memberi khidmat kepada empat orang, plaintif, defendan ketiga, defendan keempat dan pemilik-pemilik tanah pribumi yang kesemuanya mempunyai kepentingan berlainan dalam rancangan keseluruhannya. Tidak boleh digambarkan bagaimana defendan pertama atau mana-mana peguamcara boleh menyelesaikan konflik kepentingan pihak-pihak berkaitan. Defendan pertama mempunyai kewajipan fidusiari kepada semua anak guamnya dan kewajipan dan piawai berhati-hati tersebut adalah sama untuk semua anak guamnya (lihat perenggan 50).]

Notes

For cases on duty of care under legal profession in general, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1593–1639.

For cases on duty of care under negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on extrinsic evidence, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1290–1293.

For cases on power of attorney in general, see 8(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3571–3572.

For cases on professional conduct, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1434–1437.

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (not folld)

Prince Jefri Bolkiah v KPMG [1999] 2 AC 222, HL (refd)

F v R (1982) 33 SASR 189 (refd)

Foo Fio Na v Dr Soo Fook Mun & Ors [2002] 2 MLJ 129, FC (refd)

Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257, PC (refd)

Midland Bank v Hett Stubbs & Kemp [1979] Ch 384 (refd)

Rogers v Whitaker (1992) 175 CLR 479, HC (folld)

Saif Ali & Anor v Sydney Mitchell & Co (a firm) [1980] AC 198, HL (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Yong & Co v Wee Hood Teck Development Corp [1984] 2 MLJ 39, FC (refd)

Legislation referred to

Evidence Act 1950 s 91

Tiong Jia Yi (Baldev Gan & Associates) for the plaintiff.
Joan Goh (Goh & Associates) for the first and second defendants.

David Wong J:

PROCEEDINGS

[1] The plaintiff's claim is for loss and damage suffered in the sum of RM631,300 on the ground that the first defendant had breached his duty of care in contract and in tort, in respect of the purchase of a piece of land —NT013022752 ('native land'). The claim is denied by the defendants on the ground that the plaintiff had no standing to pursue this suit and even if he had, the first defendant did not breach any duty of care, in tort or in contract as he had complied with the practice accepted by the legal profession in Sabah.

[2] The case against the third defendant was withdrawn halfway through the trial while the case against the fourth defendant was withdrawn at the start of

the trial as he was never served.

BACKGROUND FACTS

[3] The plaintiff, after being asked by one Wong Nyuk Yun, the third defendant in this case, as to whether he was interested in purchasing the native land sometime in 2006, decided to do so with the intention to convert the native land at a later stage into a country lease. As the plaintiff did not have the financial ability to implement his intention, he approached one Tee Hong Wee ('PW1') who is a director, shareholder of Chang Cheng Realty Sdn Bhd ('CC Realty') and a close friend. The plaintiff at that time also worked as a general manager in CC Realty. It is undisputed that the purchase money for the purchase of native land came from CC Realty or PW1.

[4] The owners of the native land are natives and had given a power of attorney to one Tuan Haji bin Lambu ('Lambu power of attorney') with the power to dispose and charge the same to anyone he deems fit. Prior to the purchase of the native land by the plaintiff, the native land was used as a security by the third defendant for a loan from the fourth defendant. To secure that security, a caveat by one Peter bin Soui was lodged against the native land.

[5] When the plaintiff approached the first defendant about the purchase of the native land, PW1 and the plaintiff was informed by the first defendant that to complete the purchase of the native land, a sum of RM570,000 needs to be paid to the fourth defendant plus a sum of RM200,000 to be paid to Tuan Haji Lambu.

[6] It is not disputed that the first defendant and the second defendant were retained to prepare the sale and purchase agreement and other relevant documents for the purchase of the native land. What is in dispute is whether the first defendant had breached his duty of care in the retainer.

[7] It is also not disputed that the first defendant was involved in the loan transaction from the fourth defendant to the third defendant, in that he was the solicitor involved in drawing out the relevant legal documents.

[8] What had happened is that the plaintiff was not able to gain ownership of the native land despite having paid the consideration of RM665,300 to Tuan Haji Lambu and the fourth defendant, as the Central Land Officer Kota Kinabalu refused to accept the relevant memorandum of transfer on the

ground that there was irregularity in the Lambu power of attorney.

ISSUES

[9] From the evidence and submissions made by counsel the determinative issues, in my view, are these:

(a) whether the plaintiff had the standing to pursue this action;

(b) whether the defendants owed a duty of care to the plaintiff in contract or tort;

(c) if the answer to issue No 2 is in the affirmative, have the defendants breached that duty of care; and

(d) if the answer to issue No 3 is in the affirmative, has the plaintiff proved his damages.

Issue 1: Whether the plaintiff has the standing to pursue this action

[10] It is the defendants' contention that the plaintiff is not the actual purchaser of the native land based on the followings:

(a) The consideration for the purchase was paid by CC Realty and/or PW1.

(b) The plaintiff was used as a nominee to purchase the native land as CC Realty is unqualified to purchase the native land as it is not a 'native' company while the plaintiff is a native by virtue of his *anak negeri* certificate.

(c) The legal fees charged by the second defendant and the disbursements incurred were fully paid by CC Realty.

(d) The plaintiff had executed a power of attorney and trust deed to CC Realty.

[11] The plaintiff's contention on this point is the power of attorney and trust deed executed by him was 'to comfort Mr Tee' as he had lent the money to purchase the native land. The evidence in respect of this contention was objected to by the first defendant's counsel on the ground that it contravenes s 91 of the Evidence Act 1950 which provides no oral evidence is admissible to contradict any terms of agreement when the same has been reduced into writing. With respect to counsel, her objection is misconceived in that both the power of attorney and the trust deed were never executed by anyone. In another word, they are not completed documents and since the defendants are relying on those two documents to advance their case, the court is entitled to know what the real intentions of those documents are.

[12] Even if the court sustains the defendants' objection to the evidence, the court is of the view that the power of attorney and trust deed are invalid as they had not been executed by all the relevant parties.

[13] Furthermore the legal bill of the second defendant dated 26 July 2006 for the legal works in respect of the native land was issued to the plaintiff. And as pointed by counsel for the plaintiff even if the plaintiff is a nominee, he sues and can sue on behalf of CC Realty.

[14] Accordingly I find that the defendants' contention on this point to be of no merit.

Issue 2: Whether the first defendant owes a duty of care to the plaintiff in contract or in tort

[15] As there is no dispute by the first defendant that the plaintiff had retained him for the purchase of the native land, the first defendant owes the plaintiff a duty of care. What that duty of care is set out in these two cases. In *Yong & Co v Wee Hood Teck Development Corp* [1984] 2 MLJ 39 the court held:

> The principle applicable in a case of this nature as rightly applied by the learned judge is that while the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied discretion left to him. It is also his duty to keep his client informed to such extent as may be necessary according to the same criteria. (*Midland Bank Trust and Groom v Crocker*).
>
> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfill this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, (3rd Ed) Vol 36 p 96, para 131). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do. (*Midland Bank Trust Co Ltd*).

[16] And in *Saif Ali & Anor v Sydney Mitchell & Co (a firm)* [1980] AC 198 at p 231 Lord Salmon states as follows:

> The normal rule applied by the law is that if anyone holding himself out as possessing reasonable competence in his avocation undertakes to advise or to settle a document, he owes a duty to advise or settle the document with reasonable competence and care. This duty is owed to anyone he should foresee may suffer loss if the duty is breached.

> If in breach of that duty, he fails to exercise reasonable competence or care and as a result the person to whom the duty was owed suffers damage he is liable to compensate that person for the damage he has suffered. The law requires the damage to be borne by the person whose breach of duty has caused it, rather than by the innocent person who has suffered it.

Issue 3

[17] If the answer to issue No 2 is in the affirmative, have the defendants breached that duty of care?

[18] The crux of the plaintiff's claim is embodied in para 6 of the statement of claim and it is this:

> In accepting the said retainer, the 1st and 2nd Defendant held themselves out to the Plaintiff as having the adequate skill, care and knowledge to successfully effect the proposed purchase of the said land or alternatively to alert/or warn the Plaintiff against any potential defect or defect of title of the said land or any defect or want of any of the rights of the purported Attorney to sell the land on behalf of the registered owners of the said land.

[19] The defendants' rebuttal is succinctly set out in para 5(b) of the defense and it is this:

> Even if (which is denied) the Defendants were retained by the Plaintiff as his solicitors, the 1st and/or 2nd Defendant only held himself or themselves out to him as having adequate skill and knowledge properly to conduct the sale and purchase of the said Land and/or that his or their duty to him was to exercise that reasonable degree of skill and care expected of a competent practitioner and reasonable experienced solicitor only and not on the terms or the other terms as alleged at paragraph 6 of the Amended Statement of Claim.

[20] Before I deal with the factual matrix, I should set out the relevant law on the standard of skill and care expected of legal practitioners in Sabah. In *Midland Bank v Hett Stubbs & Kemp* [1979] Ch 384, Oliver J emphasised that a solicitor should not be judged by the standard of a 'particularly meticulous and conscientious practitioner … The test is what a reasonably competent practitioner would do having regarded to the standards normally adopted in his profession …'.What that entails requires the court to find out what the standard of the Sabah legal profession is in respect of the works expected of the first defendant to perform and if he has acted in accordance to that practice, he would not be negligent. This test is a restatement of what is held in the *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at p 121 as follows:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art … in the case of a medical man, negligence means failure to act in accordance with the standards of a reasonably competent medical men at the time … I myself would prefer to put in this way, that he is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art … Putting it the other way around, a man is not negligent if he is acting in accordance with such practice, merely because there is a body of opinion who would take a contrary view a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds.

[21] The *Bolam* test has not been followed in the jurisdiction of Australia. King Chief Justice in *F v R* (1982) 33 SASR 189 held as follows:

> '… professions may adopt unreasonable practices ….The court has an obligation to scrutinise professional practices to ensure that they accord with the standard of reasonableness imposed by the law ….the ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community'

[22] This view has been confirmed by the High Court of Australia in *Rogers v Whitaker* (1992) 175 CLR 479 where it was held that opinions of medical witnesses are not decisive but merely guidelines for the court who will be the final arbiter on what that standard of care should be.

[23] In the context of Malaysia, we have the celebrated case of *Foo Fio Na v Dr Soo Fook Mun & Ors* [2002] 2 MLJ 129 where the Federal Court departed from the *Bolam* principle and adopted the principle stated in the *Rogers*' case. The Federal Court said this:

> …the *Bolam* test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment. (para 36 MLJ)

[24] It is the contention of counsel for the defendants that the *Bolam* test still applies to the legal profession as the question posed to the Federal Court was

very specific in that the decision relates purely to medical negligence. For completeness the posed question is this:

> Whether the *Bolam* test as enunciated in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 in the area of medical negligence should apply in relation to all aspects of medical negligence.

[25] With respect to counsel, her approach is inappropriate. The Federal Court was dealing with the duty of care of a professional body and whatever principles distilled from that judgment in my view are applicable to other professions. In fact the Federal Court had referred to other profession and this can be seen from this paragraph of the judgment:

> … there is a need for members of the medical profession to stand up for the wrong doings, if any, *as is the case of professionals in other professions*. In so doing, people involved in medical negligence cases would be able to obtain better professional advice and that the courts would be appraised with evidence that would assist them in deliberations. (para 69 MLJ)(Emphasis added.)

[26] Accordingly it is my view that the *Bolam* principle is no longer applicable and the applicable principle is as stated in the Federal Court. With that I will now apply the principle to the factual matrix at hand.

THE PLAINTIFF'S COMPLAINTS

[27] This can be seen from para 7 of the statement of claim and it is this:

> Particulars of duty of Care:
>
> (i) The 1st and 2nd defendant ought to have taken special caution where the intended transfer of land is to be executed by person or persons purporting to act as the Attorney of the registered landowners vide to ensure that the registered owners are in fact the parties who had executed the instrument granting power to sell the land,
>
> (ii) The 1st and 2nd defendant ought to have carefully and properly verified with the registered owners personally to ensure the authenticity of the purported POWER OF ATTORNEY and to confirm that the landowners had in fact executed the same.
>
> (iii) The 1st and 2nd defendant ought to have advised and acted cautiously and prudently by retaining or withholding a substantial part of the purchase price and only paying out of the same, until and upon the successful transfer of the said land to the Plaintiff.

[28] The plaintiff's evidence is that the first defendant is his lawyer and as such it is his duty to ensure that the purchase of the native land would be

successful and his interests would be protected at all times. He of course relies on the assurance by the first defendant that there would be 'no problem' to the transaction.

THE DEFENDANTS' CASE

[29] Counsel in her submission had listed the reasons why the first defendant had not breached his duty of care and they can be summarised as follows:

(a) There is no system of checking of power of attorney in Sabah as testified by PW3, hence the defendants should not be expected to conduct any check that is non-existent, in short there is no duty of care on the part of the first defendant to check the authenticity of the Lambu power of attorney.

(b) The complaint of the plaintiff is not that he was not advised by the first defendant that there were risks involved in the use of power of attorney in the purchase of the Native Land but the fact that the first defendant had advised that the deal was legitimate. Counsel refers to this part of PWl's evidence:

> I am blaming the first defendant because since the outset of this deal Mr. Lee and I repeatedly asked Johnson Tan if this transaction is legitimate and can be carried through.

(c) Whether to proceed with the purchase of native land was in fact a business decision by the plaintiff and PW1. This, according to counsel for the defendants, can be gleaned from the context and circumstances which are summarised by counsel for the defendants in her submission as this:

> Here, the 1st defendant was involved in the conveyance for the land for the 4th Defendant initially. Halfway through the Plaintiff and CC Realty got involved somewhere in July 2006 through the introduction of the 3rd Defendant because he (the 3rd Defendant) could not proceed with the sales agreement hence he approached the Plaintiff. When the Plaintiff approached the 1st defendant pertaining to this matter, the 1st Defendant then explained and showed the Plaintiff and PW1 everything that he has in his file pertaining to the said land. After hearing the explanation and after looking at the documents shown to them by the first defendant, CC Realty through PW1 went ahead with the purchase due to the fact that the land was cheap. It was a risk which CC Realty and the Plaintiff took. The 1st Defendant cannot be held to be negligent for a decision that was made by CC Realty and the Plaintiff themselves.

(d) The plaintiff and PW1 are experienced developers and as such are fully aware of what a power of attorney is and further the risk that comes with

it. The plaintiff and PW1 knew very well how the normal purchase price is to be paid in sale of land transactions and the payments made by the plaintiff in the manner that it was done was due to the fact that the time of payment between the third defendant and fourth defendant was about to expire and the plaintiff did not want to lose the good deal in that the native land was cheap. In short the plaintiff knew the risks and made a business decision to proceed with the purchase of the native land.

[30] To complete the defendants' case, I should set out what the first defendant said in cross-examination:

Q: Refer to paragraph 9 of the witness statement. Put: It was your negligent assumption that the plaintiff, Mr Tee and CC Realty had the necessary knowledge and experience in conveyancing matters in relation to Native Titles and power of attorney?

A: I don't agree because they are developers and it was not wrong for me to assume that they have such knowledge. Most developers have knowledge of land transaction.

Put: That because of your assumption you did not think that it is necessary to advice the plaintiff or Mr Tee on any legal issues and risk.

A: I disagree. Notwithstanding any assumption on the 26/7/2006 I brief Mr Tee and Mr Lee on all the legal liabilities and legal issues involved and they went through the file with me. In fact Mr Lee and Mr Tee asked me whether the power of attorney allows the attorney to sell …

Q: On 26/7/2006, in relation to the power of attorney what advice did you give to the client?

A: On 26/7/2006 I advice the client that the power of attorney gives the attorney the right to sell the land and the power of attorney is in the process of being registered with the Magistrates Court and upon return of the power of attorney I will note it with the Land Office. At all material time Lee Chee Kiang and Mr Tee have knowledge that the power of attorney were still have to be registered with the Land Office.

Q: What else did you advice them about the power of attorney?

A: That is it.

PW3'S EVIDENCE

[31] PW3, a senior practicing lawyer in the area of conveyancing in Kota Kinabalu, is called by the plaintiff as the expert witness to establish the general practice of the legal profession in Sabah. In essence his evidence is this:

Q: Please tell the Court what is your practice when a client approaches you to engage your services in respect of the sale and purchase of land to be executed by the Vendor through a Power of Attorney?

A: Normally by practice I do not accept Power of Attorney for the reason that there is no proper of registration of power of attorney in Sabah as compared to West Malaysia. There is no way I can check whether the PA has been revoked. In West Malaysia we can check the system under the PA Act 1949 which is only applicable to West Malaysia. In respect of the PA once registered it has to be deposited with the Senior Assistant Registrar in the Court in which it was deposited. Any subsequent revocation of the PA would have to be deposited in the same Court. In Sabah there is no such system in place. Speaking for myself my practice I do not accept PA. Secondly, there could be many PA over the same subject matter. There is no registration system in Sabah to check whether the PA has been issued before or has been donated before.

The general practice is for the PA to be noted in the Land Registry for properties with titles. If there is a noting and a registration number and there is a term of clause in the PA which provides for that particular power to be effected then generally speaking the practice is for the lawyer in the conveyancing procedure to accept such PA.

By notation in the land registry there are safe guards that the PA has been registered and notice has been given to third parties. However having said that it is my practice to be overly cautious even when the PA has been registered in the land and survey department. The reason is that the land survey department are merely performing an administrative act when they register the PA. They are not under the legal duty to enquire into the validity of the PA. I highlight this matter in one of my law book under a decision by Datuk Clement Allan Skinner in the case of *Pawa Ajah*. The lawyers can protect themselves by extracting the PA which has been registered in the Land Office by extracting the copy of the PA and studying its contents carefully.

[32] One can see that PW3's view is that the use of power of attorney in land transactions is not advisable. In cross-examination, his testimony contains a similar theme and this can be seen from this inter change:

Q: Do you agree with me that since there is actually no system of PA in Sabah as compared to West Malaysia, there is no standard practice except for notation at the Land Office and registration at the Magistrates Court?

A: I would just say that for practitioners who do not want to get into trouble get the registered owner to sign instead of the Attorney.

Q: Is that your general practice?

A: I cannot say for others but from my conversation with fellow practitioners, generally this is the accepted practice in Sabah to get the registered owner to sign instead of the Attorney.

[33] With respect to PW3, his non-acceptance of the use of power of attorney in land transactions is not only impractical but would affect the flow of business activity in the state economy. It, in effect, renders contractual law relating to power of attorney redundant. Be that as it may, the Lands and Surveys Department in Sabah, I am given to understand, now does not accept documents executed pursuant to power of attorney. This shows the severity of the abuse of the use of power of attorney in land transactions in the state and I may add that is a sorry state of affair that we are in. It is also my view that PW3's evidence has not established what the general practice of the local legal profession as far as the use of power of attorney is concerned as his evidence contains his personal view and practice.

FINDINGS OF THE COURT

Duty to investigate the authenticity of power of attorney

[34] The situation in Sabah as far as power of attorney is concerned is as what is stated by PW3 and that is there is no proper system of registration as in West Malaysia. Hence I agree with counsel for the defendants that the first defendant does not have a duty to check on the authenticity of the power of attorney for the simple reason that there is no way of checking short of calling the donors and the commissioner of oaths to enquire whether the power of attorney is genuine. It would be too onerous a duty to require a solicitor to investigate a power of attorney which on the face of it is proper. As stated earlier it would be impractical and slow down the process of doing business in the state. Furthermore, commissioners of oath are appointed by the Chief Justice of the Federal Court only after due consideration and hence it can be reasonably assumed that they are people of high standing and integrity. Accordingly it is my view that a properly executed power of attorney should be accepted unless cogent reasons show otherwise and what those reasons are depends on the circumstances of each case. Before I leave this area of discussion, I should comment on the legal effect of registration of power of attorney and it is this. Registration per se of a power of attorney at the magistrate's courts and lands and surveys department do not give legitimacy to it. Registration in the magistrate's court is nothing but a practice and provides nothing but comfort to the people relying on it. As for registration or notation in the Central Land Office, Kota Kinabalu, it is nothing but a procedural step which the lands and surveys department requires before they can process documents containing signatories executed pursuant to a power of attorney. As rightly pointed out by PW3, the lands and surveys department is only performing an administrative act when processing documents in their office and the registration and acceptance of the use of the power of attorney by the central land office, Kota Kinabalu does not give legitimacy to the power of attorney if challenged later.

The first defendant's duty and standard of care

[35] As there is no dispute (and in fact conceded by counsel for the defendants) that there is a retainer in respect of the purchase of the native land between the plaintiff and the second defendant, the first defendant thus has a duty of care to the plaintiff. What is in dispute is what that duty is and the standard thereof? Before I discuss that, the following should be noted. The first defendant prior to being retained by the plaintiff had acted for the third and fourth defendants where the fourth defendant extended a loan to the third defendant on the security of the native land. To crystallise that security, the third defendant relied on the Lambu power of attorney and the original title deed to the native land. In order for the plaintiff to crystallise his purchase of the native land, the plaintiff was advised by the first defendant that he had to pay off both the fourth defendant and Tuan Haji Lambu as representative of the land owners. And hence the use of the Lambu power of attorney is pivotal to the plaintiff in his purchase of the native land. There is no legal impediment for a practitioner in Sabah to act as a common solicitor to parties in a transaction and hence in this purchase of the native land, the first defendant had acted for four parties, namely, the plaintiff, third and fourth defendants and the owners of the native land represented by Tuan Haji Lambu by virtue of the power of attorney. Be that as it may, the first defendant's duty of care to the plaintiff is no less burdensome to that of the other parties in the transaction. In another word, the interests of all the parties must be protected even though they may conflict with each other. How that is possible remains a mystery to the court. As far as the plaintiff is concerned and in normal circumstances, his basic interest, in plain language, is simply for the first defendant to ensure that his purchase of the native land is immune from any loss as has happened in this case where the plaintiff has paid a substantial amount of money to the fourth defendant and Tuan Haji Lambu without the benefit of becoming the registered owner of the native land. Of course the defence is that the circumstance in this case is not normal and this case must be determined in accordance with the peculiar facts herein.

[36] However it is my view that the plaintiff has, on the evidence presented, established a prima facie case of requiring the first defendant to protect this basic interest and it is incumbent on the first defendant to rebut that.

[37] Having carefully considered the evidence of the first defendant, there appears to be two lines of defences which are these:

(a) The plaintiff and CC Realty are experienced developers and knew the full intricacy of how a power of attorney works and the risks involved. That being the case, plus the fact that they did not want to lose a 'good deal',

A they took the risks involved in the use of a power of attorney in proceeding with the purchase and did not need the advice of the first defendant.

(b) The first defendant had explained 'all the legal liabilities and legal issues' involved.

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[38] The two defences in my view contradict each other because one says that the plaintiff and CC Realty did not need the first defendant's advice, while the other says the first defendant had explained all the legal matters to the C plaintiff. With such a contradictory stance, the first defendant's defence appears to be shadowy. Even if the court accepts that the first defendant had explained all legal matters to the plaintiff and CC Realty, there is lacking in details what are the legal liabilities and legal issues. In fact there is no detail before the court. Again it is trite law when a defence is short in detail; the court D regards it nothing more than a bare assertion. Furthermore it is unlikely that the first defendant had explained 'all the legal liabilities and legal issues' to the plaintiff except to assure all will be okay and the reasons are these. The first defendant had acted for the third and fourth defendants in respect of a loan using the power of attorney to Tuan Haji Lambu and native land as security and E one can assume that he had informed the third and fourth defendants that the use of the Lambu power of attorney for the loan transaction was proper. Hence upon being approached by the plaintiff for the purchase of the native land, the first defendant would have no doubt told the plaintiff that there should be 'no problem' as he had already given a similar advice to the third and fourth F defendants. But as to how the first defendant arrived at that 'advice' to the third and fourth defendants the court is not aware. Accordingly I accept the version of the plaintiff that he had been assured by the first defendant that there will 'no problem' with the purchase of native land and there was no explanation of any legal liability and legal issues to the plaintiff.

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[39] As for the contention that the plaintiff and PW1 are not ordinary lay person and hence implying that the first defendant's duty of care is lighter, I, with respect, find it untenable. The law should be (and I am sure it is) that a solicitor's standard of care remains the same whatever their client's education H background is. This proposition requires no supporting authority. In any event the first defendant is an experienced and senior member of the local Bar and prudence would have dictated him to obtain a letter of declaimer from the plaintiff stating that the second defendant would not be liable for any loss or damage if he wants to release any part of the consideration before the lodgment I of the memorandum of transfer with the Lands and Surveys Department Central Land Office, Kota Kinabalu and the issuance of the memorial number of the lodgment by the same. I have no doubt that the prevailing conveyance practice in Sabah in a sale and purchase cum redemption of loan transaction is this. No money from the purchaser would be released by the solicitor until he

or she obtains a memorial number from the Central Land Office Kota Kinabalu for the lodgment of the transfer with the title to the native land.

[40] In my deliberation as to which version of events is more credible I was guided by what was stated in the judgment in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 which stated:

> For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.

[41] Also in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257, the court expressed similar sentiments:

> And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall possibilities. In this connection, Their Lordships wish to endorse a passage from a judgment of one of their number in *Armasas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 when he said at p 57:
>
> Speaking from experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.
>
> That observation is, in Their Lordship's opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

[42] The question which confronts me now is this: what did the first defendant mean by 'no problem'?

[43] There is no doubt in my mind that by 'no problem', the first defendant and the plaintiff took it to mean that the purchase of the native land would present no legal difficulty to implement and again my reason is that the first defendant had acted as the solicitor for the fourth defendant and third defendant in the loan transaction prior to the purchase of the native land by the plaintiff. Of course the purchase of the native land was not able to be implemented as the legitimacy of the power of attorney was in doubt.

[44] The following matters are undisputed:

(a) The caveat of Peter bin Soui who is a nominee of the fourth defendant was only presented to the lands and surveys department on 2 June 2006 with no issuance of memorial number from Central Land Office, Kota Kinabalu.

(b) The memorandum of transfer supporting the caveat by Peter bin Soui does not contain any 'CLO P/A No' for Lambu power of attorney.

(c) The Lambu power of attorney was only presented to the Central Land Office, Kota Kinabalu for registration on the 7 August 2006.

(d) The memorandum of transfer of the native land was lodged with Central Land Office, Kota Kinabalu on 25 August 2006.

(e) The Central Land Office on 4 September 2006 informed the second defendant that the Lambu power of attorney could not be registered as one of the landowners had lodged a complaint to their office.

(f) The first defendant did not investigate the September 2006 reply by the Central Land Office, Kota Kinabalu and this is what he says in cross-examination:

> Q: Did you attend at the Land Office to see anyone regarding this letter?
>
> A: I did not. What I did is I liaise with Mr Wong and ask him to solve this matter with the Land Office.

(g) The second defendant again on 17 October 2006 lodged the memorandum of transfer of the native land with Central Land Office, Kota Kinabalu.

(h) On 3 October 2007, the second defendant wrote to the Central Land Office, Kota Kinabalu enquiring the status of the transfer of native land.

(i) The Central Land Office, Kota Kinabalu on 22 August 2008 informed the second defendant that the memorandum of transfer could not be processed because of two police reports, one by one of the owners of the native land and the other by the plaintiff. The Lands and Surveys Department had also registered a collector's caveat on the native land.

[45] To recap, what we have at hand is the sale and purchase transaction of native landed property encumbered with an equitable charge for a loan extended to the third defendant by the fourth defendant. The duties of a solicitor would be these:

(a) Conduct a search on the native land at the relevant office of the Lands and Surveys Department to ensure that there is no encumbrance attached to it.

(b) Obtain the original title deed to the native land.

(c) Ensure that the Lambu power of attorney has been properly executed and witnessed by the appropriate person and contains the power of disposal of the native land.

(d) Ensure that the Lambu power of attorney has been registered with the magistrate court and with the Central Land Office Kota Kinabalu.

(e) Advise the plaintiff that it is not his interest to release any money to the owners or the fourth defendant who holds an equitable charge on the native land until all the relevant documents have been executed and the memorandum of transfer together with the supporting documents had been successfully lodged to Central Land Office Kota Kinabalu and the issuance of the memorial number by the same.

(f) Explain to the plaintiff all the risks involved in the use of a power of attorney in the purchase of the native land, the primary risk being that the owners may not have signed the power of attorney.

(g) Inform the plaintiff that he acts as a common solicitor for four parties in the transaction and the risks related thereto.

(h) Advice the plaintiff to engage another solicitor to act for him for the purchase of the native land to avoid any conflict of interests between the four parties.

[46] From the evidence which I have alluded to earlier, it shows quite conclusively that the first defendant had, with respect, failed in his basic duty in protecting the interests of the plaintiff. As stated by earlier, the prevailing conveyance practice in Sabah would be to advice against releasing any purchase consideration to the vendor and chargee until a memorial number is obtained from the Central Land Office Kota Kinabalu by the solicitor for the lodgment of the memorandum of transfer of the native land. The first defendant has not given the court any credible reasons as to why he should be exempted from that basic duty.

[47] As for the sum claimed, the sum of RM631,300 in my view has been proved by the plaintiff in the form of documentary evidence and they have not been rebutted by the defendants.

[48] Accordingly I dismiss the defendants' defence and enter judgment for the plaintiff in the sum of RM631,300 with interests at the rate of 8%pa from the date of this judgment until final payment of the judgment sum with costs.

[49] As a closing remark, let me say that the time has come for the legal profession to regulate the practice of a common solicitor for consumers in land, loan and charge transactions. A good starting point would be for the local Bar to look at the regulatory rules in England which I have attached as annexure A. Lord Millet in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 in my view had made a pertinent remark and it is this:

> A (lawyer) cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

[50] The case before me is a classic example as to why the first defendant should not have acted for the plaintiff or at the very least should have advised him to engage any other solicitor to act for him. He had to serve four masters, the plaintiff, the third defendant, fourth defendant and the owners of the native land who all had different interests in the scheme of things. It is unimaginable as to how the first defendant or for that matter any solicitor could have resolved all the conflicting interests of the relevant parties. It must be noted that the first defendant has fiduciary duties to all his clients and that duty and standard of care is the same for all his clients.

Plaintiff's application allowed.

Reported by Kanesh Sundrum